IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-79

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

RAY MARSHALL, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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FOR
RELEASE

Supreme Court Review

Petition Filed:

Freedom of Information—Confidential Business Data—No Ruling Below (CA D.C., 722 FCR A-1): Neither the Freedom of Information Act's exemptions nor 18 USC U.S.C. §1905 give suppliers of munitions confidential business data a private cause of action to enjoin the Government from disclosing non exempt information. Moreover, a disclosure of affirmative action data made pursuant to the Office of Federal Contract Compliance Programs' regulations is "authorized by law" and thus not prohibited by 18 §1905.

Questions presented: (1) Is Exemption 4 of the FOIA mandatory, thus prohibiting federal agencies from disclosing confidential, commercial and financial information that falls within its scope? (2) Are administrative agency regulations promulgated under 5 U.S.C. § 301 within the "authorized by law" exception in 18 U.S.C. §1905? (3) Is the submitter of private, confidential business information, the release of which would cause substantial competitive harm to the submitter, entitled to de novo review of the administrative agency determination to publicly disclose that information where the information is exempt from disclosure under Exemption 4 of the FOIA, or where it is prohibited from disclosure by 18 U.S.C. §1905? (General Dynamics Corp. v. Marshall, Sup. Ct. No. 78-79, petition filed, 7/13/78)

BNA NEWS

FREEDOM OF INFORMATION: NO RIGHT TO ENJOIN DISCLOSURE GRANTED BY FOIA EXEMPTIONS OR $1905, EIGHTH CIRCUIT RULES

Neither the Freedom of Information Act's exemptions nor 18 U.S.C. §1905 give suppliers of confidential business data a private cause of action to enjoin the Government from disclosing exempt information, the U.S. Court of Appeals for the Eighth Circuit rules.

Moreover, a disclosure of affirmative action data made pursuant to the Office of Federal Contract Compliance Programs' regulations is "authorized by law" and thus not prohibited by §1905, the court states, siding with the Third Circuit. (General Dynamics Corp. v. Marshall, CA 8 No. 77-1192, 2/14/78)

General Dynamics brought suit to enjoin disclosure of the Affirmative Action Programs submitted to the Government by the contractor's Electric Boat and Convair Divisions.

The district court, finding that the data fell under Exemption 3 of the FOIA, as "specifically exempted from disclosure by statute," granted General Dynamics a permanent injunction. The basis of the court's decision was that 18 U.S.C. §1905, which bars Government from making unauthorized disclosures of confidential business data, prohibited release of the AAPs. The court further found that the information fell within Exemption 4, which protects confidential commercial information, and viewed the exemption as mandating nondisclosure.

However, the appeals court rules, the lower court erred in treating the exemptions as mandatory and in reviewing de novo the agency's decision to disclose.

The FOIA expressly creates a cause of action in favor of requesters of information to enjoin agencies from withholding it, but doesn't create one for suppliers to enjoin a disclosure falling within the exemptions, the court states. "In plain terms, FOIA is simply not applicable in reverse cases since the statute unequivocally states that the Act 'does not apply' to matters of the type specified in the exemptions. 5 U.S.C. §552(b)."

Noting that there are conflicting decisions over the permissive v. mandatory question, the court agrees with the Third Circuit's holding in Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (702 FCR A-4), that the Act neither requires nondisclosure of exempt data nor provides a cause of action to prevent disclosure. "Any other construction would controvert 'the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' Department of the Air Force v. Rose," 425 U.S. 352 (1976).

In view of the limited circumstances in which a private cause of action can be implied from a federal criminal statute, the court also endorses the view expressed in Chrysler that §1905 doesn't give suppliers of data a cause of action to enjoin disclosure.

But, even assuming §1905 applied, OFCCP regulations, 41 CFR §60-40.2, authorize disclosure of data in AAPs -- including some information that would be exempt under the FOIA -- if its release is in the public interest and would not impede agency functions. Thus, the court finds, disclosure of data pursuant to these regulations is "authorized by law" and not within the prohibition of §1905. Under this view, §1905 not only fails to provide a private cause of action but also does not afford protection under Exemption 3.

Faced with the Government's decision to release the AAP data, General Dynamics had the right to seek judicial review under the Administrative Procedure Act. However, this would not be de novo review, only a determination on the administrative record as to whether the agency's decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law.

Again citing Chrysler, the court sets out the procedure for APA review in reverse FOIA cases. First, a court must decide whether the information is within the scope of the FOIA; and if it is, whether an exemption applies. If the agency has decided that no exemption is applicable, the question is whether it has applied the correct legal standards. However, if the agency decided that an exemption applies but disclosure is permissible, the court must review that decision as to reasonableness of the agency's judgment and according to legal standards. If the record is inadequate, the court can remand or require the agency to supplement the record.

In the case of Convair's affirmative action data, the court finds that OFCCP's failure to state any rationale for its decision to disclose requires remand to the agency.

In denying Electric Boat's objection to disclosure, OFCCP did set forth certain reasons: that disclosure wouldn't benefit competitors in bidding against the contractor, the FOIA exemptions are permissive, and that disclosure would benefit the public for specified reasons.

However, OFCCP's decision didn't consider whether disclosure might impede agency effectiveness, the court notes. This is a standard of legal concern promulgated by the agency and the lack of explicit evidence that it was considered requires either remand or additions to the record. -- Lay, J.

(Editor's Note: The Supreme Court has granted review in the Chrysler case, See Section B of this Report.)

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MINORITY CONTRACTING: SBA CHIEF OUTLINES PLANS FOR IMPROVING SECTION 8(a) MINORITY BUSINESS PROGRAM

The Administrator of the Small Business Administration has outlined to a somewhat skeptical Senate panel plans for rebuilding the Section 8(a) Minority Business Program, which include setting aside certain federal agency contracts to assist those designated as economically or socially disadvantaged to gain a foothold in the business world.

Testifying again before the Senate Governmental Affairs Subcommittee on Federal Spending Practices (689 FCR A-17), SBA chief A. Vernon Weaver reported that since the hearing last summer the 8(a) Review Board he established has completed its review and has made 51 recommendations, most of which he plans to implement.

He has ordered SBA field personnel to eliminate Section 8(a) sponsorships "designed to victimize socially or economically disadvantaged persons," and the agency has reviewed all such existing arrangements whereby the disadvantaged have been used as "fronts" by those not disadvantaged in order to gain access to 8(a) set-aside Government contracts.

He has also established stricter control procedures to preclude nondisadvantaged ownership in 8(a) firms and has ordered that former U.S. employees not participate in any SBA program within a two-year period following termination of employment, he said.

Weaver observed to the panel that the 8(a) program has been developed with no real statutory base as such, and with none of the traditional congressional guidelines that normally direct such programs, and this has created problems. He described the program as one based on a superstructure of Executive Orders imposed on a general provision on subcontracting which includes no reference to members of minority groups or socially or economically disadvantaged persons.

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To the United States Court of Appeals for the Eighth Circuit

Petitioner General Dynamics Corporation, plaintiff below, respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The February 14, 1978 opinion of the Court of Appeals is reported at 572 F.2d 1211 (Appendix A, at A-1-A-12). The *per curiam* order of the Court of Appeals denying General Dynamics Corporation's petition for rehearing and rehearing en banc is unreported but is included in the appendix hereto (Ap-

pendix B, at A-13). The December 29, 1976 opinion of the District Court is reported at 427 F.Supp. 578 (Appendix C, at A-14-A-22).

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1978. A timely petition for rehearing and rehearing en banc was denied on April 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), is mandatory and requires that federal agencies not disclose confidential, commercial and financial information which falls within its scope.

2. Whether administrative agency regulations promulgated under 5 U.S.C. §301 are within the "authorized by law" exception contained in 18 U.S.C. §1905 which statute prohibits disclosure of private, confidential business information.

3. Whether the submitter of private, confidential business information, the release of which would cause substantial competitive harm to the submitter, is entitled to *de novo* review of an administrative agency determination to publicly disclose that information where the information is exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), or where it is prohibited from disclosure by 18 U.S.C. §1905.

STATUTES AND REGULATIONS

The relevant provisions of the Freedom of Information Act, 5 U.S.C. §552, as amended, 18 U.S.C. §1905, 5 U.S.C. §301,

and the relevant portions of the Office of Federal Contract Compliance regulations, 41 C.F.R. Part 60-40, and the Department of Labor regulations, 29 C.F.R. §§ 70.21 and 70.71, are set forth in the appendix (Appendix D, A-23-A-29).

STATEMENT OF CASE

This is a "reverse" Freedom of Information Act ("FOIA") case. In a direct FOIA case, a member of the public seeks to obtain documentary information about governmental activities and policies, and a government agency has refused to disclose the information. The plaintiff then institutes an action charging that the FOIA requires the government to disclose the information. In such an action, the plaintiff is entitled to *de novo* review of the agency's decision. In a reverse FOIA case, a private party, here petitioner General Dynamics Corporation ("General Dynamics"), has submitted private, confidential business documents to a government agency and seeks to prevent that agency from disclosing confidential information in violation of the exemption provisions of the FOIA and other statutory or regulatory prohibitions against disclosure, such as 18 U.S.C. §1905 and 29 C.F.R. §70.21.

A substantial portion of the business of two General Dynamics' divisions, Electric Boat and Convair, consists of contracts or subcontracts with the United States government. As a condition to doing business with the government, General Dynamics is required by Executive Order 11246, as amended, and the regulations promulgated thereunder to take affirmative action to eliminate any discriminatory employment practices. The failure of a government contractor to comply with the Executive Order and regulations can result in the cancellation of existing contracts and the debarment of the contractor from future contract awards.

In order to assure compliance with the Executive Order and regulations, the government requires every large contractor and subcontractor to prepare and file an annual Employer Information Report, known as an EEO-1 Report. General Dynamics has prepared and submitted such reports annually. These reports contain summary data on the number of women and minority group members employed by the contractor or subcontractor.

In addition, such governmental contractors are required to prepare and submit, upon request, annual affirmative action programs ("AAP's"). In portions known as "manning tables", the AAP's provide extensive and detailed financial and commercial information, both statistical and narrative in nature, on the past and projected employment at the two divisions. Convair and Electric Boat's AAP's contain, *inter alia*, detailed statistics on staffing patterns, pay scales, actual and expected shifts in employment, and promotions. The two AAP's also include forecasts of future employment, goals, timetables and future employment projections, by distinct job classifications, for females and minority group members. In addition, General Dynamics includes in its AAP's analyses by specific job classifications of areas in which there is an underutilization of minorities and women and analyses of its success in meeting its goals.

Much of this information provided to the government in these AAP's is not required under the regulations but is provided voluntarily by General Dynamics and other contractors to aid both the government and the contractors in meeting their goals of increased female and minority employment. These AAP's are confidential and are submitted to the agencies with the express understanding that their confidentiality will be protected. The two government "compliance agencies" which received the AAP's at issue here were the Maritime Administration, Department of Commerce, for Electric Boat and the Defense Supply Agency, Department of Defense, for Convair.

In June, 1975, the two compliance agencies received requests from the public under the FOIA for the 1974 Electric Boat AAP and the 1975 Convair AAP. In each case, the relevant compliance agency notified General Dynamics in July, 1975, of the fact that a FOIA request had been made and requested General Dynamics to identify any information which it believed was not subject to disclosure under the FOIA. General Dynamics did not object to disclosure of the AAP's in their entirety, but only objected to the disclosure of those portions of the AAP's containing the detailed statistical information relating to the divisions' work forces.

The Maritime Administration responded cryptically on August 1, 1975, that it had "decided not to invoke Exemption 4 (5 USC 552(b)(4)) and to release the aforementioned portions of the AAP." Subsequently, the Defense Supply Agency advised General Dynamics that, after a review of the cited portions of the Convair Division's AAP, the agency had "found nothing therein which falls within any exemption under the Freedom of Information Act (FOIA)" and therefore that the information would be disclosed. General Dynamics unsuccessfully appealed both of these decisions to the Office of Federal Contract Compliance ("OFCC").

Faced with what it deemed an arbitrary and cursory denial of its legal rights under the Freedom of Information Act and with the threatened disclosure of the documents, General Dynamics filed the instant action seeking a more careful and considered review of its claims of confidentiality. After entry of a temporary restraining order and after discovery, the government requested that the parties enter into a stipulation of the essential facts and that the permanent injunction issue be submitted to the court, on cross-motions of the parties, for judgment on the merits based upon the stipulation, extensive documentary evidence, numerous affidavits of both parties, and upon the comprehensive briefs, proposed findings of fact and conclusions of

law. At no time did the government object to the admission or consideration of evidence in the District Court supplementing the agency record. In fact, as noted, the government itself offered such evidence.

On December 29, 1976, the District Court, finding jurisdiction under 28 U.S.C. §1331, entered a permanent injunction and ordered the defendants not to disclose in any way the challenged confidential portions of the two AAP's. After a review of the AAP's and the affidavits and partially in reliance upon the decision of the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977), the court concluded that the cited portions of the two AAP's contained confidential commercial and financial information, the release of which would cause substantial competitive harm to General Dynamics; were within 5 U.S.C. §552(b)(3) and 18 U.S.C. §1905, and within 5 U.S.C. §552 (b)(4); and as such were protected from disclosure by the agencies.[1]

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[1] With respect to the confidential commercial and financial information contained in the AAP's, the District Court found, *inter alia*:

> [T]his data, along with wage rates and salary information readily available from union contracts and other published sources, would enable a competitor to estimate with considerable reliability the firm's composite or weighted average labor cost. Knowledge of the divisions' labor costs would give a competitor a tactical advantage in bidding on a project that the competitor would not normally have since the labor cost is the most difficult part of a cost for an outsider or a competitor to estimate.
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> * * * In addition, the disclosure of several of the plans over a period of time could indicate any new techniques or processes that the company was using. This would be valuable in shortening the lead time advantage that the divisions might have in the introduction of a new technique.
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> [K]nowledge of a planned reduction in the number of jobs can create concern in the minds of the employees for their job security. If the AAP shows such a decrease in the number of jobs, * * * this will likely induce affected employees to stretch out the work and thus adversely affect productivity and the plaintiff's ability to compete. On the other hand, if the AAP reveals an increase in the number of jobs in a certain category, this may result in excessive demands by the various unions representing the affected workers, again causing adverse effects on productivity. Finally, if the AAP shows contemplated increases in jobs for some union proportionately greater than for other unions, this can result in increased rivalry and tensions between unions resulting in grievances, arbitrations, and work stoppages based upon jurisdictional disputes.

427 F.Supp. at 580-81.

On appeal, the Eighth Circuit adopted the reasoning of the Third Circuit in *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *cert. granted sub nom. Chrysler Corp. v. Brown*, 98 S.Ct. 1466 (U.S. March 6, 1978) (No. 77-922), and reversed and remanded the trial court's decision. In so doing, the court held, *inter alia:* (1) that administrative agencies have discretion to disclose private, confidential business information exempt from disclosure under Exemption 4; (2) that disclosure of such information pursuant to regulations promulgated under 5 U.S.C. §301 is "authorized by law" as that phrase is used in 18 U.S.C. §1905; (3) that neither the FOIA itself nor 18 U.S.C. §1905 create a cause of action for submitters of information to enjoin agency disclosures; and (4) that such a cause of action exists only under Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. §706. Accordingly, the court held that in an action to enjoin proposed agency disclosure of documents the standard of review should not be that of *de novo* review but should be limited to an inquiry, based on the administrative record, as to whether the agency's decision to disclose was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Finding the administrative record inadequate with respect to both General Dynamics' divisions, the court remanded the cause for further proceedings and for supplementation of the respective agency records.[2]

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[2] In this respect, the court held that the agencies could submit further testimony or affidavits to supplement the agency record but that General Dynamics was not entitled to the same opportunity. 572 F.2d at 1218 n. 8.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' opinion errs in overlooking significant decisions of this Court and the legislative history of the FOIA and 18 U.S.C. § 1905. The court's opinion is also in direct conflict with decisions in the Fourth and District of Columbia Circuits. One of the principal factors leading the court to its erroneous decision was its failure to recognize and give consideration to the fundamental distinction enunciated in the FOIA and its legislative history between information submitted by private parties and information concerning governmental activities and policies. In so doing, the court's opinion is inconsistent with the basic purpose of the FOIA to enable individuals to obtain information about their government and to mandate release of that information from reluctant governmental agencies. The Act was not intended to expose to public purview traditionally confidential information of private parties. Exemption 4 of the Act offered private parties just such protection. As stated by Congress in the legislative history, Exemption 4 is "necessary to protect the confidentiality of information . . . which would customarily not be released to the public by the person from whom it was obtained."[3] By failing to recognize the inherent inadequacies of the administrative process, the court further erred in denying the submitter of confidential business information meaningful judicial review of its claims that release of such information would cause it substantial competitive harm.[4]

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[3] S. Rep. No. 813, 89th Cong. 1st Sess. 9 (1965).

[4] For example, General Dynamics as well as other submitters have had agencies disclose to competitors trade secret, technical and cost information contained in a government contract bid. Under the court's opinion, a submitter would not be entitled, even in that instance, to a *de novo* hearing in the district court to present evidence substantiating its claim. It would instead be limited to a cursory review of the issues before the agencies, and then only a review of the necessarily truncated and incomplete agency record before the district court.

For the reasons outlined above and for those discussed below, General Dynamics respectfully submits that the writ of certiorari should be granted by this Court.

I. The Court of Appeals' Decision That Exemption 4 to the FOIA Is Permissive and Provides Agencies With Discretion to Disclose Exempt Documents Is in Conflict With Both the Legislative Purposes and History of the FOIA and With Decisions in Other Circuits.

The respondents argued below, and the Court of Appeals agreed, that they were empowered with discretion to release the contested portions of the AAP's despite the fact that the District Court had found those documents to be within the scope of the fourth exemption to the FOIA because the release thereof would cause substantial competitive injury to General Dynamics. The asserted basis for this holding by the court was that any "other construction would controvert 'the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " 572 F.2d at 1216. In accepting this argument, the Court of Appeals adopted a position which, while accepted in some circuits,[5] is directly contrary to that of the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger, supra.* In fact, the court expressly noted the existence of this conflict in the circuits by stating that the "courts have reached conflicting decisions" on this question of the nature of the fourth exemption. 572 F.2d at 1215. Other courts have or are currently struggling with this issue.[6] It is thus

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[5] *Chrysler Corp. v. Schlesinger, supra; Pennzoil Co. v. FPC,* 534 F.2d 627 (5th Cir. 1976); *Charles River Park "A", Inc. v. HUD,* 519 F.2d 935 (D.C. Cir. 1975). As noted, the most recent of these cases is pending before this Court.

[6] *See Hughes Aircraft Co. v. Schlesinger,* 384 F.Supp. 292 (C.D. Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.) (one year after oral argument, the Ninth Circuit withdrew the case from submission in April, 1977, and the case remains undecided); *Union Oil Co. v. FPC,* 542 F.2d 1036 (9th Cir. 1976) (language, subsequently withdrawn, to the effect that FOIA exemptions mandate nondisclosure).

clear that there is a basic conflict between the circuits, the proper resolution of which this Court can reach through a careful examination of the legislative history and purposes behind the FOIA.

Businesses have always maintained their records in confidence. The reason for this secrecy is founded in the concern that such information might be helpful to a competitor and in the desire to conduct business affairs in private. This Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), affirmed the importance of protection of confidential business data such as trade secrets:

> The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law. "The necessity of good faith and honest, fair dealing, is the very life and spirit of the commercial world." . . . In A. O. Smith Corp. v. Petroleum Iron Works Co., 73 F.2d, at 539 [6th Cir. 1934], the Court emphasized that even though a discovery may not be patentable, that does not "destroy the value of the discovery to one who makes it, or advantage the competitor who by unfair means, or as the beneficiary of a broken faith, obtains the desired knowledge without himself paying the price in labor, money, or machines expended by the discoverer."

416 U.S. at 481-82. Congress acknowledged this public policy in preventing the unfair competitive use of confidential commercial information by enacting such provisions as Exemption 4 to the FOIA and 18 U.S.C. §1905. "These provisions recognize and provide for the non-disclosure of confidential business information compiled through an owner's efforts, skills, and resources, and thus, there is [a] public interest in favor of judicial protection of such data." *USS-OCF-W&M v. Eckerd*, No. 76-1933 (D.D.C., Dec. 9, 1976) slip op. at 5.

Congress in enacting the FOIA expressly recognized the need to maintain the traditional protection afforded to confidential commercial information. Both the House and Senate Reports on the FOIA bills provide that the exemption is intended to protect information which customarily would not be released to the public by the person from who it was obtained. In enacting Exemption 4, Congress specifically sought to protect such business information and expressly exempted it from mandatory disclosure.[7] The FOIA legislative history also makes it clear that the only intent and purpose of the Act in this respect was to make available to the public information concerning records and actions of the various governmental agencies. It was *not* intended to make public reports, plans and data confidentially submitted to the government by private parties. As stated by one commentator,[8] and as cited with approval in *Westinghouse Electric Corp. v. Schlesinger, supra*:

> The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and

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[7] The Senate Report, citing examples of the types of information which customarily would not be made public, provides that this category would include business sales statistics, inventories, customer lists, manufacturing processes, and "any commercial, technical, and financial data" submitted to a lending agency in connection with a loan. S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The House Report also specifies that the exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in labor-management mediations. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). As stated in the hearings on the FOIA bill: "We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor". Hearings on S. 1666 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 174 (1963) (Treasury Department witness).

[8] Note, A Review of the Fourth Exemption of the Freedom of Information Act, 9 Akron L. Rev. 673, 694 (1976) (footnote omitted).

> to obtain information about government activities and policies. The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are.

542 F.2d at 1210 n. 64.

It is fundamental therefore that private documents and the confidential information contained therein do not lose their private character merely because such documents have been submitted to a governmental agency either pursuant to a mandatory filing requirement or voluntarily in an effort to comply with a regulatory program and to cooperate with a government fact-finding agency. A private document should remain private even though information taken therefrom may be used confidentially by government for its own purposes. If Exemption 4 of the FOIA is permissive and if federal agencies have the discretionary power to release exempt documents, as the court below holds, the protections afforded confidential commercial information by Congress have been all but eliminated. If left to stand the Eighth Circuit's decision would reduce Exemption 4 and 18 U.S.C. § 1905 to ineffectual admonitions. As it is in direct conflict with the law of the Fourth Circuit and with the legislative purposes and history of the FOIA, this Court should grant certiorari to review the holdings of the court below.

II. The Court of Appeals' Decision That Agency Regulations Promulgated Under 5 U.S.C. §301 Are Within the "Authorized by Law" Language of 18 U.S.C. § 1905 Is in Conflict With the Legislative History and Purposes of 18 U.S.C. §1905 and 5 U.S.C. §301 and With Other Circuit Court Law.

The Court of Appeals held that the disclosure of General Dynamics' AAP's is "authorized by law" within the meaning of

18 U.S.C. §1905. Specifically, in reliance upon the Third Circuit's decision in *Chrysler Corp. v. Schlesinger, supra,* the court held (1) that the OFCC's disclosure regulations (41 C.F.R. Part 60-40) authorize release of the documents to the public; (2) that such regulations are authorized by 5 U.S.C. §301, are valid, and therefore have "the force of law"; (3) that the regulations satisfy the authorization requirement of Section 1905, and (4) consequently, that disclosure of General Dynamics' AAP's would not violate Section 1905. Again, there is a conflict in need of resolution among the circuits on this question. The Court of Appeals specifically recognized that its decision was in conflict with holdings in the Fourth and D.C. Circuits.[9] 572 F.2d at 1217. On the other hand, the Third and Seventh Circuits hold in accordance with the court below.[10]

That this conflict in the law is in particular need of resolution by this Court can be seen by recognition of the fact that Section 1905 is a provision which establishes standards of conduct for government employees with respect to the release of confidential information submitted to the government and imposes criminal sanctions for non-adherence to those standards. With the law under that section in such a state of uncertainty, it is difficult, if not impossible, for government employees to determine what response they should make to a FOIA request.[11] For the following reasons, this uncertainty in the law can, and should, be resolved by this Court in accordance with the holdings of the Fourth and D.C. Circuits.

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[9] *Westinghouse Electric Corp. v. Schlesinger, supra,* (Fourth Circuit); *Charles River Park "A", Inc. v. HUD, supra,* (D.C. Circuit).

[10] *Chrysler Corp. v. Schlesinger, supra,* (Third Circuit); *Sears, Roebuck and Co. v. Eckerd,* — F.2d — (7th Cir., April 25, 1978) (No. 77-1417).

[11] It should be noted in this respect that an agency employee is faced with the decision of whether (1) to disclose the documents and thus expose himself to possible criminal sanctions under Section 1905 or (2) to refuse to disclose the documents and thus expose himself to possible contempt sanctions under 5 U.S.C. § 552(a)(4)(G).

First, disclosure regulations such as the OFCC's which were promulgated for the express purpose of implementing the FOIA[12] cannot constitute authorization by law within the meaning of Section 1905 for the disclosure of FOIA-exempt information. In *FAA Administrator v. Robertson*, 422 U.S. 255, 266 (1975), this Court concluded that the FOIA could not be read to repeal by implication the then existing statutes restricting public access to government records.[13] Since Section 1905 was extant when the FOIA was enacted and since Congress intended that the FOIA itself would not affect the applicability of pre-existing nondisclosure statutes, agency disclosure regulations which are promulgated for the express purpose of implementing the FOIA necessarily cannot have that effect.

Second, the phrase "authorized by law", as employed in Section 1905, cannot be construed to include agency regulations as a basis for disclosure of information. "Authorization by law" should be limited to statutory or judicial authorization. In this regard, Section 1905 is a criminal provision aimed at preventing government officials or employees from improperly disclosing certain kinds of confidential information. The potential defendants in criminal actions under the section are, thus, government officials. The holding of the court below would result in allowing government officials, the potential defendants, to define or redefine the scope of illegal conduct under Section 1905 merely

[12] *See* 41 C.F.R. §60-40.1.

[13] More specifically, in *FAA Administrator v. Robertson*, this Court was called upon to construe the relationship between the FOIA and pre-existing statutes which prohibited the disclosure of information in government files. On the basis of the FOIA's legislative history, this Court concluded that the Act could not be "read as repealing by implication all existing statutes 'which restrict public access to specific Government records' [H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)]" and that Congress intended "to permit the numerous laws then extant allowing confidentiality to stand". 422 U.S. at 265-66.

by amending or promulgating agency regulations and, thereby, to relieve themselves of criminal liability for acts which would otherwise violate Section 1905. This result not only violates the clear congressional intent of Section 1905 but also contravenes public policy.[14]

Finally, even assuming arguendo that an administrative agency's disclosure regulations could generally serve as authority for disclosure of documents within the meaning of Section 1905, the regulations here would not provide that authority in this case. Section 70.21 of the Department of Labor's disclosure regulations prohibits any employee of the agency from disclosing any documents the disclosure of which would be prohibited by Section 1905. *See* 29 C.F.R. § 70.21(a). Further, under 29 C.F.R. § 70.71, any supplementary disclosure provisions promulgated by any division or office of the Department of Labor—including the OFCC—must be "not inconsistent with" the Department of Labor's disclosure regulations. Accordingly, the disclosure regulations of the agencies involved herein, rather than authorizing the disclosure of information which would otherwise be nondisclosable under Section 1905, emphasize the necessity of obeying the statute by specifically incorporating and applying the statute's prohibition. *See Westinghouse Electric Corp. v. Schlesinger, supra*, 542 F.2d at 1203; *Parkridge Hospital, Inc. v. Blue Cross and Blue Shield*, 430 F.Supp. 1093, 1097-98 (E.D. Tenn. 1977).

[14] *See Westinghouse Corp. v. Schlesinger, supra*, where the Fourth Circuit stated: "It would be an incredible rule that a legislative prohibition such as §1905, fixing limits on executive action . . ., is to be construed and applied by the executive. . . . This would be tantamount to committing the execution of such law to 'the self-restraint of the executive branch' itself and making the executive's *ipse dixit* final." 542 F.2d at 1215 (citations omitted).

Also note that the disclosure regulations, 41 C.F.R. Part 60-40, were promulgated by the agencies without prior notice or opportunity for public comment.

This Court should therefore grant certiorari in this case to review the Court of Appeals' erroneous holding and, in so doing, should establish guidelines for government employees in accordance with the reasoning set forth herein.[15]

III. **The Court of Appeals' Decision That the Standard of Review Is Limited to That of Section 706 of the Administrative Procedure Act Is in Direct Conflict With the Law of Other Circuits and the Decisions of This Court.**

The Court of Appeals held that, while General Dynamics did have the right to seek judicial review of the decisions of the two agencies to release the portions of the AAP's, the review of the disclosure decisions would not entail *de novo* review but would instead require a determination, based on the administrative record, as to whether such decisions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[16] 572 F.2d at 1217. By adopting these standards of Section 706 of the APA for review in reverse FOIA cases, the Court of Appeals acted in direct conflict with the

[15] If, as argued above, this Court should decide that the agency disclosure regulations involved herein are not within the "authorized by law" language of Section 1905, the Court should also address the question of whether Section 1905 is a provision providing for specific statutory exemption within the meaning of 5 U.S.C. §552 (b)(3). Once again, there is a conflict among the circuits, and this issue is also in need of resolution by this Court. *Compare Westinghouse Electric Corp. v. Schlesinger, supra,* (Fourth Circuit) (holding that Section 1905 is an Exemption 3 statute), *with Charles River Park "A", Inc. v. HUD, supra,* (D.C. Circuit) (holding Section 1905 not to be an Exemption 3 statute).

[16] This holding is based upon the court's premise that neither Exemption 4 to the FOIA nor 18 U.S.C. §1905 provide an implied cause of action to the submitter of confidential information to secure judicial review of an agency disclosure decision. This premise is also in error and in need of review by this Court should the Court determine that *de novo* review is inappropriate under the APA. *See Cort v. Ash,* 422 U.S. 66 (1975); *Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F.2d at 1209-10.

Fourth and D.C. Circuits and contrary to the decisions of this Court.

The Fourth and the D.C. Circuits have held that a judicial determination as to whether business records are within Exemption 4 is to be made *de novo.*[17] The determination is to be made *de novo* regardless of whether the issue is raised by a requester in a FOIA action to compel disclosure of the records or by a submitter seeking to prevent disclosure in a reverse FOIA action. In fact, the D.C. Circuit has held that *de novo* review is appropriate even where the cause of action is based on the APA.[18] This is in contrast to the holdings of the court below and the Third Circuit in *Chrysler Corp. v. Schlesinger, supra.*

Additionally, the Court of Appeals' decision denying *de novo* review overlooks and is contrary to this Court's holding in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). Under that case and Section 706(2)(F), "*de novo* review is authorized when the agency action is adjudicatory in nature and the agency fact finding procedures are inadequate". 401 U.S. at 415. Thus, if the action below meets these requirements, *de novo* review is appropriate even under the APA.

Initially, there is no doubt that agency decisions to disclose documents such as the AAP's involved herein are adjudicatory in nature in that such decisions involve questions relating to the type of information involved, the uses which could be made of the information if disclosed, and the effects of disclosure. Likewise, there is, as a brief summary will establish, no doubt

[17] *See Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F. 2d at 1214-15; *Sears, Roebuck and Co. v. GSA,* 553 F.2d 1378, 1381 (D.C. Cir. 1977); *Charles River Park "A", Inc. v. HUD, supra,* 519 F.2d at 940 n.4. The FOIA affords a requester seeking to compel disclosure *de novo* review. 5 U.S.C. §552(a)(4)(B).

[18] *Sears, Roebuck and Co. v. GSA, supra,* 553 F.2d at 1381; *Charles River Park "A", Inc. v. HUD, supra,* 519 F.2d at 940 n. 4.

that the fact finding procedures used by agencies are inherently inadequate. These inadequacies include, *inter alia*, the following: (1) Neither the FOIA nor many agency regulations require that notice be given to the submitter of private, confidential information which is to be disclosed; (2) even in situations where the agency has gratuitously given notice to the submitter, disclosure decisions must be made within the ten day limitation of 5 U.S.C. §552(a)(6)(A)(i); and (3) neither the FOIA nor agency regulations permit adequate extensions of this ten day limitation to provide (a) the submitter with the time to examine the requested documents, to present its objections, and to appeal within the agency or (b) the agency official with the time to provide the submitter the opportunity for a hearing, to carefully review the documents and objections prior to making his decision, and to make findings of fact.[19] It is thus clear that the fact finding procedures utilized by federal agencies are inherently inadequate, and *de novo* review is required.

The cornerstone of the Court of Appeals' decision, adequate agency consideration, is thus a fiction which rests on the misconstruction of the FOIA and of congressional intent. Congress did not intend to preclude *de novo* review of a submitter's claim that trade secret and confidential information is exempt from disclosure under the FOIA. If Congress had had that intent it would not in the 1974 FOIA amendments have compelled agency disclosure decisions within ten days thereby making meaningful submitter presentation of objections, adequate agency review, and development of an agency record impracticable, if not impossible. This Court should therefore grant certiorari to review the erroneous decision of the court below

[19] It should be further noted that agency officials often lack the expertise necessary for a proper evaluation of the documents and, without adequate time to develop at least a minimal degree of expertise, an intelligent decision on disclosure will be impossible.

on this standard of review issue and should hold that, as is made clear by congressional intent and the APA itself, *de novo* review is required.[20]

IV. Certiorari Should Be Granted Since This Court Has Granted Certiorari in a Substantially Identical Case.

As has been mentioned herein, this Court has granted certiorari to review the Third Circuit's judgment in *Chrysler Corp. v. Schlesinger, supra.* A comparison of the issues raised in that matter with the issues raised in this petition reveals that the cases are substantially identical. In such situations, this Court has in the past granted certiorari in order to consider the cases together. *See Taylor v. McElroy,* 360 U.S. 709 (1959).

Further, the Court of Appeals below relied heavily on the Third Circuit's opinion in the *Chrysler* case in reaching its decision. In fact, the Court of Appeals relied on the Third Circuit's reasoning with respect to each critical issue in the case. Under such circumstances, it is clear that certiorari should be granted in order to consider the cases together.

Finally, if this Court deems it inappropriate to grant certiorari on any of the bases discussed herein, General Dynamics respectfully submits that as a minimum this petition be taken under consideration pending this Court's resolution of the *Chrysler* case and then an appropriate disposition of this petition and matter be ordered.

[20] It should further be noted that, even if it is held that *de novo* review is inappropriate, the Court of Appeals erred in not concluding that agency disclosure in this case would not be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. This is because disclosure would violate 18 U.S.C. §1905, as discussed above, and the agencies' own regulations such as 29 C.F.R. §70.21. *See Charles River Park "A", Inc. v. HUD, supra,* 519 F.2d at 943. This Court should grant certiorari to review and correct this error also.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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Certificate of Service

I hereby certify that three copies of this Petition were served by First Class Mail, postage prepaid, on each of the following attorneys on July 12, 1978:

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APPENDIX

Before GIBSON, Chief Judge, and LAY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

General Dynamics Corporation seeks injunctive relief to prevent disclosure of portions of the Affirmative Action Programs (AAP's) of General Dynamics' Electric Boat and Convair Divisions, filed with federal agencies as a condition to the award of government contracts. Third parties had requested the disclosure of the information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

After receiving notice of administrative decisions to disclose much of the requested information, General Dynamics filed suit in the federal district court seeking to permanently enjoin the disclosures. The court recognized that General Dynamics had a valid cause of action arising under FOIA and 18 U.S.C. § 1905. After considering stipulated facts and affidavits filed in support of cross motions for summary judgment, the district court determined that the contested portions of the AAP's were within the scope of 5 U.S.C. § 552(b)(3), which exempts from mandatory disclosure under FOIA information "specifically exempted from disclosure by statute." The basis of the court's determination was its finding that disclosure of the information was prohibited by 18 U.S.C. § 1905. The district court further found that the information in question was within the scope of 5 U.S.C. § 552(b)(4), which exempts confidential commercial and financial information from the provisions of FOIA. The district court granted a permanent injunction prohibiting disclosure of the contested portions of the AAP's of both the Electric Boat and Convair Divisions of General Dynamics, apparently construing the FOIA exemptions as mandatory provisions requiring nondisclosure. *General Dynamics Corp. v. Dunlop*, 427 F.Supp. 578 (E.D.Mo.1976).

We find that the district court erred in construing the statutory exemptions of FOIA to be mandatory and in undertaking de novo review of the administrative determination to disclose the information in question. We reverse and remand for further proceedings.

On June 24, 1975, a request for a copy of the Electric Boat Division's AAP was sent to the Maritime Administration. The Maritime Administration informed General Dynamics of this request and the procedures to be followed in objecting to the proposed disclosure. Electric Boat Division objected to the disclosure of parts of the AAP, asserting that the information was exempt from disclosure under FOIA, 5 U.S.C. § 552(b)(4), and regulations of the Office of Federal Contract Compliance Programs (OFCC), 41 C.F.R. § 60-40.3(a)(1) and (2), as confidential commercial and financial information.[1] The Maritime Administration determined that disclosure of the information was proper despite Electric Boat's objections and this de-

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[1] FOIA lists nine specific exemptions from the otherwise mandatory disclosure required by the Act, two of which are relevant to this appeal:

> This section does not apply to matters that are—
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . .

5 U.S.C. § 552(b).

The OFCC regulations also exempt certain materials from required disclosure:

> *Information exempt from compulsory disclosure and which may be withheld.*
>
> (a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public in-

cision was upheld by the OFCC on appeal with certain minor exceptions for information relating to specific employees.

The Convair Division AAP was requested from the Defense Supply Agency (DSA) on June 2, 1975. Convair Division objected to the disclosure of parts of the AAP on the grounds that the information was "confidential and proprietary data" exempt from disclosure under FOIA. The DSA determined that the contested information did not fall within any FOIA exemption and therefore disclosure was mandated under the Act. The decision to disclose much of the information was affirmed on appeal to the OFCC, although that agency's determination was apparently based on OFCC regulations rather than the provisions of FOIA.

As a government contractor, General Dynamics is required by Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed.Reg. 14303 (1967), to take affirmative action to eliminate discriminatory employment practices. Regulations promulgated by the Secretary of Labor require that certain government contractors pre-

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terest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

41 C.F.R. § 60-40.3.

pare and make available for administrative inspection AAP's providing information on past and projected employment of women and minorities. 41 C.F.R. §§ 60-1.40, 60-2.1. The regulations delegate administrative responsibility for enforcing the Executive Order to the Director of the Office of Federal Contract Compliance Programs. 41 C.F.R. § 60-1.2. The Director, in turn, has designated certain "compliance agencies" which have primary responsibility for monitoring compliance with the provisions of the Executive Order. 41 C.F.R. §§ 60-1.3, 60-1.6. The Maritime Commission and the DSA are the compliance agencies for the Electric Boat and Convair Divisions, respectively.

The provisions of FOIA are applicable to records submitted to the compliance agencies, and in addition the Secretary of Labor has promulgated regulations setting out guidelines for the disclosure of information received by the OFCC or its compliance agencies from government contractors. *See* 41 C.F.R. § 60-40.1 et seq. These regulations are designed to implement FOIA and reflect the policy of the OFCC to disclose information to the public and cooperate with other agencies and private parties seeking to eliminate discrimination in employment.[2]

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[2] In addition to the disclosure requirements imposed by FOIA, the OFCC regulations mandate disclosure by the agency, upon specified findings, of a broad class of documents, including some information that would be exempt under FOIA. Specifically, the regulations provide:

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically pro-

The FOIA requires agencies to disclose upon request information not specifically exempt under 5 U.S.C. § 552(b). *See Department of the Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976); *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). The Act expressly creates a cause of action in favor of parties requesting information to enjoin agencies from withholding that information. 5 U.S.C. § 552(a)(4)(B). It is likewise clear that only information which falls within the exemptions listed in FOIA may be withhold by the agency despite a request for disclosure. However, the Act does not create a cause of action for submitters of information to enjoin an agency from disclosing information within the exemptions listed in § 552(b). In plain terms, FOIA is simply not applicable in reverse cases since the statute unequivocally states that the Act "does not apply" to matters of the type specified in the exemptions. 5 U.S.C. § 552(b).

Despite this clear statutory language, courts have reached conflicting decisions as to the permissive or mandatory nature of the exemptions and the existence of a cause of action, based on FOIA itself, to enjoin proposed disclosure of information within the exemptions. *See Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924, 97 S.Ct. 2199, 53 L.Ed.2d 239 (1977) (holding that a cause of action exists to enjoin disclosure of exempt information); *Union Oil Co. v. FPC*, 542 F.2d 1036, 1045 (9th Cir. 1976) (language, subsequently withdrawn as premature, to the effect that FOIA exemptions mandate nondisclosure); *Pennzoil Co. v. FPC*,

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hibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

41 C.F.R. § 60-40.2.

534 F.2d 627, 630 (5th Cir. 1976) (holding that exemptions are permissive); *Charles River Park "A", Inc. v. HUD*, 171 U.S. App.D.C. 286, 519 F.2d 935, 941 (1975) (holding exemptions permissive).[3]

In the most recent decision, *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *petition for cert. filed sub nom. Chrysler Corp. v. Brown*, 46 U.S.L.W. 3438 (U.S. Dec. 27, 1977) (No. 77-922), the Third Circuit reviewed the legislative history of FOIA exemptions. In a well-reasoned opinion by Judge Gibbons the court held that both the Act and its legislative history clearly establish that there exists no statutory mandate of nondisclosure of exempt information nor any cause of action to prevent disclosure of such information.[4] We agree. Any other construction would controvert "the basic policy that dis-

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[4] The legislative history of the 1974 amendments to FOIA leave little doubt that Congress' intent was that the exemptions be considered permissive:

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive*. They merely mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information *should* be withheld.
>
> A number of agencies have by regulation adopted this position that, notwithstanding applicability of an FOIA exemption, records must be disclosed where there is no compelling reason for withholding. . . . This approach was clearly intended by Congress in passing the FOIA.

S.Rep.No. 93-854, 93d Cong., 2d Sess. 6 (1974).

[3] *But see* K. Davis, Administrative Law Treatise § 3A.5, at 122 (Supp. 1970), where the commentator unequivocally states:

> The exemptions protect against required disclosure, not against disclosure. The Act leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law, by the common law, by executive privilege, by executive orders, or by agency-made law in the form of regulations, orders, or instructions.

closure, not secrecy, is the dominant objective of the Act." *Department of the Air Force v. Rose, supra,* 425 U.S. at 361, 96 S.Ct. at 1599.

Such a construction is in harmony with the principal statement by the Supreme Court as to the effect of FOIA exemptions:

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have *the option* to keep confidential, *if it so chooses.* As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either . . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep.No. 813, p. 3. [89th Cong., 1st Sess. 1965)].

EPA v. Mink, supra 410 U.S. at 80, 93 S.Ct. at 832 (emphasis added).

See also Department of the Air Force v. Rose, supra 425 U.S. at 361-62, 96 S.Ct. 1592.

We find the district court erred in construing the exemptions as mandatory provisions requiring nondisclosure and affording a basis for injunctive relief.

The district court alternatively held that 18 U.S.C. § 1905 provided a cause of action to enjoin disclosure of information submitted to government agencies. Section 1905 is a criminal statute providing penalties for disclosure of a broad class of

information where disclosure is "not authorized by law."[5] In view of the limited circumstances in which a private cause of action may be implied from a federal criminal statute, *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), we endorse the view expressed in the *Chrysler* case that 18 U.S.C. § 1905 does not afford submitters of information a cause of action for injunctive relief against proposed disclosures by administrative agencies. *See Chrysler Corp. v. Schlesinger, supra* at 1188. Furthermore, even assuming the applicability of § 1905, the statute's criminal sanctions for disclosure of information apply only to disclosures "not authorized by law." Here, OFCC regulations specifically provide for the disclosure of AAP's upon a finding that disclosure would be in the public interest and would not impede agency functions. *See* 41 C.F.R. § 60-40.2.[6]

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[5] Title 18 U.S.C. § 1905 provides as follows:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[6] Promulgation of regulations setting out procedures for handling agency documents is authorized by 5 U.S.C. § 301, which states:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

We find disclosure pursuant to the OFCC regulations is "authorized by law" and not within the prohibition of 18 U.S.C. § 1905. *See Chrysler Corp. v. Schlesinger, supra* at 1186-88. *But see Westinghouse Electric Corp. v. Schlesinger, supra* at 1201-03; *Charles River Park "A", Inc. v. HUD, supra* 171 U.S. App.D.C. at 293-94, 519 F.2d at 942-43.[7]

Faced with administrative determinations by the OFCC to disclose information pursuant to the regulations of that agency, General Dynamics did have the right to seek judicial review of the decisions under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. Such action would not, however, entail de novo review by the district court but would instead require a determination on the administrative record of whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

The procedure for review by the district court in reverse FOIA cases under the APA is made clear in the *Chrysler* case. First, the court must determine whether the contested information is within the scope of FOIA; second, assuming that it is, the court must decide whether the information falls within any FOIA exemption. If the agency has determined that no exemption is applicable the reviewing court must examine whether the agency has applied the correct legal standards in its determination. On the other hand, if the agency has found that an exemption is applicable but disclosure is nonetheless permissible and desired, the court must review the agency's decision in light of the governing legal standards (*e. g.*, the agency's

[7] Under our holding, we think it clear that not only does § 1905 fail to provide a private cause of action, but for the reasons stated, contrary to the district court's holding, it does not afford a basis for exemption under § 552(b)(3).

regulations) and the reasonableness of the agency's factual judgment. The court shall, however, determine on the basis of the administrative record whether the agency decision must be set aside as arbitrary or capricious. In doing so the district court cannot merely substitute its own judgment for that of the agency. When the record is deemed inadequate the court may require the agency to supplement the administrative record as to the reasons for its holding or remand to the agency for additional proceedings.[8]

In the present case the administrative record fails to disclose the underlying bases of the disclosure order of the OFCC concerning the AAP of the Convair Division. We are left in doubt as to whether the agency felt the exemptions were applicable, and, if so, whether under its regulations such disclosure would be in the public interest and would not impede the discharge of agency functions. The rationale for the conclusion of the OFCC is not set forth. Under the circumstances we deem it necessary to remand the case to the district court based solely on the inadequacy of the administrative record.

In contrast to the determination regarding the AAP of Convair, the OFCC set forth the following major points in denying the Electric Boat Division's objections to the Maritime Administration's disclosure order: (1) Electric Boat failed to meet

[8] In the present case the district court considered stipulated facts and a number of affidavits submitted by General Dynamics in support of its allegations that disclosure of the information contained in the AAP's would harm General Dynamics in its competitive position and in its labor relations. As indicated, we feel this was error in that the district court review should be only upon the administrative record. This does not preclude testimony or affidavits from the administrator setting forth reasons for the agency decision. *See Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). In the present case, at least as it concerns the AAP of the Convair Division, as in the *Chrysler* decision, the agency record is too ambiguous for the court to comprehend the rationale of the agency's holding. Under circumstances we feel a remand by the district court to the agency is the more appropriate procedure to be followed.

its burden under 41 C.F.R. § 60-60.4(d) to demonstrate that the information in question should not be disclosed under the standards set forth in 41 C.F.R. § 60-40.3; (2) disclosure of the information would not benefit competitors in submitting bids against Electric Boat on contracts; (3) FOIA exemptions are permissive rather than mandatory; and (4) disclosure of the information would benefit the public because

> [i]nternal and external dissemination of an employer's affirmative action program enables employees and potential applicants for employment to know and avail themselves of opportunities. Such dissemination enables interested persons to appreciate the detailed analysis performed by the contractor in establishing his equal employment program and the effort expended in achieving the goal.

Notwithstanding the more complete attempt to comply with its regulations, the OFCC's decision does not consider whether disclosure might affect or impede the overall effectiveness of the agency in discharging its functions. This is a standard of legal concern promulgated by the agency. Although it might be argued that the finding is implicit in the agency's order of disclosure, we think the importance of the question requires explicit evidence that the agency has in fact given consideration to this factor before ordering disclosure. The district court is at liberty to require the OFCC to supplement the administrative record in this regard or to remand the case to the agency for this determination. The district court on review must then decide whether the agency's determination is a lawful one under the standards of review set forth herein.

The order of the district court granting injunctive relief is vacated and the cause is remanded to the district court for proceedings consistent with this opinion.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

77-1192 September Term, 1977

General Dynamics Corporation,
Appellee,

vs.

Ray Marshall, etc., et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 27, 1978

APPENDIX C

General Dynamics Corporation,
a corporation, Plaintiff,

v.

John T. Dunlop, Secretary, United
States Department of Labor, et al.,
Defendants.

No. 75-850C(1).

United States District Court,
E. D. Missouri, E. D.

Dec. 29, 1976.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MEREDITH, Chief Judge.

This matter was tried to the Court on stipulation of facts, affidavits, exhibits and briefs. Both parties have filed cross motions for summary judgment.

FINDINGS OF FACT

1. Plaintiff, General Dynamics Corporation, is a Delaware corporation having its principal office at Clayton, Missouri, and is engaged, *inter alia*, in interstate commerce in the development and production of military and commercial aircraft, space systems, tactical missiles (including associated electronic systems and equipment) and in naval and commercial ship building as

well as the production and distribution of a variety of industrial and commercial products. A portion of Plaintiff's business consists of contracts or subcontracts with agencies of the United States government.

2. Defendants, including the Secretaries of the Departments of Labor and Commerce, are various agency heads charged under statute, executive order and regulations with the administration of the federal government's contract compliance and affirmative action programs, and with compliance with the provisions of the Freedom of Information Act.

3. In this action, plaintiff General Dynamics Corporation requests this Court to enjoin permanently, and to declare unlawful, the defendant government officers' intended public disclosure of two Affirmative Action Programs (AAP's) prepared by plaintiff and submitted to the defendants in connection with the award and maintenance of government contracts. In its first claim for relief, General Dynamics Corporation seeks to prevent and enjoin the disclosure of portions of the AAP of General Dynamics Corporation, Electric Boat Division, July 1974, filed August 14, 1975. In its second claim for relief, General Dynamics Corporation seeks to prevent and enjoin the disclosure of portions of the AAP of General Dynamics Convair Division, January 1975.

4. Plaintiff is a government contractor and is thereby subject to Executive Order 11246, as amended, and the regulations promulgated thereunder. Failure of a government contractor to comply with the Executive Orders and Regulations can result in the cancellation of existing contracts and debarment of the contractor from future contract awards. In accordance with these Executive Orders and Regulations, plaintiff has annually prepared and has submitted to the Department of Labor's various compliance agencies its written AAP's for equal employment opportunity for certain of its facilities. The AAP's are prepared pursuant to the government's routine review of the contractor's

compliance with its equal employment opportunity obligations or pursuant to an investigation. Plaintiff includes in its AAP's analyses of the areas in which there is an under-utilization of minorities and women.

5. In the instant case, the two government compliance agencies designated to review plaintiff's compliance with the Executive Orders and relevant regulations are the Maritime Administration, Department of Commerce, for General Dynamics Corporation, Electric Boat Division (plaintiff's First Claim for Relief), and the Defense Supply Agency, Department of Defense, for General Dynamics Corporation, Convair Division (plaintiff's Second Claim for Relief).

6. Defendants are also responsible for complying with the requirements of the Freedom of Information Act, Section 552, Title 5, United States Code (1970), and the disclosure regulations which implement that Act, 41 CFR § 60-40.1 *et seq.* (1975).

7. By letter dated July 3, 1975, the Maritime Administration informed plaintiff that the agency had received a request from the Connecticut Women's Education and Legal Fund, Inc. (CWEALF) for a copy of the AAP of General Dynamics Corporation, Electric Boat Division, July, 1974. The letter informed General Dynamics that prior to releasing this material, in accordance with Title 41, Code of Federal Regulations, § 60-40, the Maritime Administration wished to be advised of any objections that plaintiff had to such release and further requested plaintiff to identify any information which it believed was not subject to disclosure under the Freedom of Information Act, Title 5, United States Code, Section 552, with the specific reasons why such information was not disclosable.

8. By letter dated July 30, 1975, the Defense Supply Agency informed plaintiff that the agency had received a request from one John E. Glenn, Treasurer, National Association for the Advancement of Colored People, San Diego branch, for a copy of the AAP of General Dynamics Corporation, Convair Division, January 1975. This letter likewise informed General Dynamics that it was being offered the opportunity to object to the proposed disclosure.

9. General Dynamics objected to the proposed disclosure in each case. With respect to the Electric Boat Division, the plaintiff objected by letter to the release of Appendix A and Addendums (1) and (2) to its AAP. The letter stated that these documents contained confidential information, the release of which would cause substantial harm to the competitive position of plaintiff and would aid its competitors and as such was exempt from disclosure under the Freedom of Information Act. With respect to the Convair Division, the plaintiff objected to the release of pages 5 through 66 and pages 87 through 89 of its AAP for essentially the same reasons.

10. The Maritime Administration subsequently advised General Dynamics that it had decided not to exempt the relevant Electric Boat Division program from disclosure. General Dynamics appealed this decision to the Office of Federal Contract Compliance (OFCC). That office later informed plaintiff that its appeal had been denied and that the decision of the Maritime Administration to disclose the aforementioned document and information had been affirmed, excepting only a portion of Addendum (1), to wit: the names and pay rates of specific employees mentioned therein.

11. The Defense Supply Agency subsequently advised General Dynamics that, after a review of portions of the Convair Division's AAP, the agency found nothing therein which fell within any of the exemptions of the Freedom of Information Act and it would be disclosed. General Dynamics appealed this decision to the OFCC. The OFCC later informed plaintiff that its appeal had been partially denied in that the decision of the Defense Supply Agency to disclose a portion of the afore-

mentioned document and information had been affirmed. Thereafter, plaintiff was advised that the agency had re-examined its position and that certain portions of the program which the agency had previously stated would not be released would now be released.

12. By affidavits, plaintiff has presented evidence which leads this Court to find that the questioned documents contain commercial and financial information of a confidential nature. The affidavit of Dr. Thomas Stevenson, a professor of economics, establishes that the AAP's contain detailed information on the exact number of workers by job, class, and department which each General Dynamics division had at the beginning of the program and what the division expected to employ during the time period covered. According to Dr. Stevenson, this data, along with wage rates and salary information readily available from union contracts and other published sources, would enable a competitor to estimate with considerable reliability the firm's composite or weighted average labor cost. Knowledge of the divisions' labor costs would give a competitor a tactical advantage in bidding on a project that the competitor would not normally have since the labor cost is the most difficult part of a cost for an outsider or a competitor to estimate. Dr. Stevenson also concluded that, although the employment projections are of short-run duration, changes could indicate to a competitor that new production techniques were being planned. In addition, the disclosure of several of the plans over a period of time could indicate any new techniques or processes that the company was using. This would be valuable in shortening the lead time advantage that the divisions might have in the introduction of a new technique.

13. Both AAP's state that there will be reductions and increases in the number of jobs in various job categories. In the affidavit of Charles H. Spoehrer, a well known and regarded expert in the field of labor relations and problems in the St. Louis area, it is established that knowledge of a planned reduc-

tion in the number of jobs can create concern in the minds of the employees for their job security. If the AAP shows such a decrease in the number of jobs, Mr. Spoehrer concluded that this will likely induce affected employees to stretch out the work and thus adversely affect productivity and the plaintiff's ability to compete. On the other hand, if the AAP reveals an increase in the number of jobs in a certain category, this may result in excessive demands by the various unions representing the affected workers, again causing adverse effects on productivity. Finally, if the AAP shows contemplated increases in jobs for some unions proportionately greater than for other unions, this can result in increased rivalry and tensions between unions resulting in grievances, arbitrations, and work stoppages based upon jurisdictional disputes.

14. The Court concludes, after a review of these affidavits, that the disclosure of this confidential commercial and financial information will cause substantial harm to the competitive position of General Dynamics.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. § 1331. That section provides for federal district court jurisdiction over civil actions "wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." In this action, the injury sought to be prevented is sufficiently alleged in the Complaint as being in excess of the requisite jurisdictional amount and the controversy arises under the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552, and 18 U.S.C. § 1905. Jurisdiction is therefore proper under 28 U.S.C. § 1331. *Westinghouse Electric Corp. v. Schlesinger*, 392 F.Supp. 1246, 1248 (E.D.Va.1974), aff'd 542 F.2d 1190 (4th Cir. 1976).

2. The plaintiff's action is not barred by the doctrine of sovereign immunity because the actions of the federal officers are beyond their statutory authority and thus are not the actions of the sovereign. See *Dugan v. Rank*, 372 U.S. 609, 621, 83 S. Ct. 999, 10 L.Ed.2d 15 (1963). Additionally, the requested relief, if granted, would not "expend itself on the public treasury or domain, or interfere with the public administration." *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947). This action is thus not barred by the doctrine of sovereign immunity. *Westinghouse Electric Corp. v. Schlesinger, supra; Hughes Aircraft Co. v. Schlesinger*, 384 F.Supp. 292, 294 (C.D.Cal.1974).

3. This Court concludes that the materials and documents plaintiff General Dynamics seeks to enjoin from disclosure are within the scope of 5 U.S.C. § 552(b)(3). That section, the third exemption to disclosure under the FOIA, states that the disclosure provisions do not apply to matters which are "specifically exempted from disclosure by statute." In this case, the matters sought to be disclosed are prohibited from disclosure by 18 U.S.C. § 1905. Section 1905 makes it a crime for government officers or employees to disclose in any manner or to any extent not authorized by law any information relating to trade secrets, operations, style of work, or other confidential commercial and financial matters. It has been held, and this Court agrees, that Section 1905 is a statute within the meaning of Section 552(b)(3). *Westinghouse Electric Corp. v. Schlesinger, supra.* See also *Administrator Federal Aviation Administration v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975); *Charles River Park "A" Inc. v. Department of Housing and Urban Development*, 171 U.S.App.D.C. 286, 519 F.2d 935 (1975). Because the disclosure of the AAP's is prohibited by Section 1905, the materials are exempt under Section 552 (b)(3).

4. The Court also concludes that the relevant materials and documents are within the scope of 5 U.S.C. § 552(b)(4)

because those documents contain confidential commercial and financial information. As the Court found in its Findings of Fact, the disclosure of the information in the AAP's would cause substantial harm to the competitive position of plaintiff. This information is thus within Exemption (b)(4) of *Brockway v. Department of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975); *National Parks and Conservation Ass'n v. Morton*, 162 U.S.App.D.C. 223, 498 F.2d 765, 770 (1974). Furthermore, several courts have held that such confidential information in AAP's is within the scope of § 552(b)(4) and thus have prohibited disclosure by the administrative agency. See *Chrysler Corp. v. Schlesinger*, 412 F.Supp. 171 (D.Del.1976); *Westinghouse Electric Corp. v. Schlesinger, supra.* This Court is in agreement with those decisions and therefore holds that the requested materials are exempt under § 552(b)(4).

5. Because the materials sought to be disclosed are within exemptions (b)(3) and (b)(4) of the FOIA, this Court concludes that plaintiff General Dynamics Corporation is entitled to the relief sought in its Complaint and its Motion for Judgment is hereby granted. It is also ordered that the defendants John T. Dunlop, Secretary, United States Department of Labor; Rogers C. B. Morton, Secretary, United States Department of Commerce; Philip J. Davis, Director, Office of Federal Contract Compliance Programs, United States Department of Labor; Robert J. Blackwell, Assistant Secretary of Maritime Affairs, United States Department of Commerce; John M. Heneghan, Director, Office of Civil Rights, Maritime Administration, United States Department of Commerce; Willaim P. Clements, Deputy Secretary, United States Department of Defense; Frederick A. Schreiber, Director, Contracts Compliance, Defense Contract Administration Services Region, Los Angeles, California, Defense Supply Agency, United States Department of Defense, Lt. Gen. Wallace H. Robinson, Jr., Director, Defense Supply Agency, United States Department of Defense; and James W. Cisco, Administration Chief, Contracts Administration Services,

Defense Contract Administration Services, Defense Supply Agency, United States Department of Defense, be and hereby are permanently enjoined from disclosing in any way the following portions of the plaintiff's AAP's:

1. Appendix A and Addendums (1) and (2) to the Affirmative Action Program of General Dynamics Corporation, Electric Boat Division, July, 1974, issued August 14, 1975.

2. Pages 5 to 66 and 87 to 89 of the Affirmative Action Program of General Dynamics Corporation, Convair Division, January, 1975.

APPENDIX D

Statutes and Regulations

The Freedom of Information Act, 5 U.S.C. § 552, as amended, provides in relevant part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

* * * * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

* * * * * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * * * *

(b) This section does not apply to matters that are—

* * * * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld * * *;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * * * *

18 U.S.C. 1905 provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The OFCCP disclosure regulations, 41 C.F.R. Part 60-40, provide in pertinent part:

5 U.S.C. § 301 provides:

The head of an Executive department or military department may prescribe regulations for the government of his

department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

29 C.F.R. § 70.21 provides:

§ 70.21 Records not disclosable.

(a) Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

(b) No records of the Department of Labor with respect to matters specifically required by statute to be kept secret shall be made available for inspection or copying under the provisions of this part. By virtue of the exclusionary language in 5 U.S.C. 552(b)(3) the disclosure requirements of the Freedom of Information Act do not apply to or authorize the disclosure of records with respect to any matters specifically exempted from disclosure by statute.

(c) No records of the Department of Labor with respect to matters specifically authorized under criteria established by

Executive order to be kept secret in the interest of the national defense or foreign policy and properly classified pursuant to such order shall be made available for inspection or copying under the provisions of this part. Records concerning such matters are expressly excluded from the application of the disclosure requirements of the Freedom of Information Act by the provisions of 5 U.S.C. 552(b)(1).

29 C.F.R. § 70.71 provides:

§ 70.71 Authority of agency officials in Department of Labor.

Each agency of the Department of Labor for which an officer or officers have authority to issue rules and regulations may through such officers promulgate supplementary regulations, not inconsistent with this part, governing the disclosure of particular or specific records which are in the custody of that departmental unit. Agencies of the Department which do not or have not promulgated special supplementary regulations governing disclosure of particular records shall disclose such records pursuant only to the provision of Subparts A and B of this Part 70.

41 C.F.R. Part 60-40 provides:

§ 60-40.1 Purpose and scope.

This part contains the general rules of the OFCC providing for public access to information from records of the OFCC or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and

the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCC and the compliance agencies.

§ 60-40.2 Information available on request.

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60-40.3 Information exempt from compulsory disclosure and which may be withheld.

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action

against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

§ 60-40.4 Information disclosure of which is prohibited by law.

The Standard Form 100 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709 (e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.